

Friday, July 14, 2006

At a long and complex Armed Services Committee hearing on the legal process for detainees at Guantanamo, Chairman Duncan Hunter (R-CA) called my name. For nearly two hours, I had listened to lawyers spar over the fine points of the Geneva Convention and the Uniform Code of Military Justice; parse a Supreme Court ruling; and swat each other with hypothetical legal scenarios.

"Mr. Chairman, " I began. "Much to my mothers shame, I am not a lawyer and never went to law school. That puts me at a decided disadvantage in this hearing. However, it also gives me the powerful advantage of common sense."

It is easy to lose sight of common sense through the density of legal complexity and the thick haze of partisan rhetoric. But this issue -- how we will design a system that prosecutes so-called "enemy non-combatants" in the war on terror -- really rests on clear and fundamental questions:

How does a democracy protect its national security and preserve its national identity at the same time? How do we kill, capture and punish enemies who seek to destroy our values of freedom and justice, and at the same time offer our enemies the shelter of the very values they wish to destroy?

That is the question the Armed Services Committee has set-out in response to the Supreme Court decision that the current process violates federal and international law. And our first hearing, last Wednesday, revealed a a surprise for me.

When I tuned-out the heated rhetoric and the pin-point legal sparring, I realized that there is actually significant congressional agreement on many fundamental issues.

For example, consider this rhetorical flourish by one Pentagon lawyer who testified. He outlined a scenario where a U.S. Marine kicks in the door of a potential terrorist hide-out in Afghanistan, grabs a suspect by the scruff of the neck, and then has to read that suspect "his rights" while "filling out legal forms."

I asked him who had advocated such a rule? What Member of Congress proposed it? In what legislation? What speech? He couldn't name one.

In fact, while the rhetoric may be dramatic, the facts are rather bland. Not a single Member of the Committee argued that the legal protections enjoyed by Americans should be completely and purely applied to enemy combatants. Everyone recognized that the vagaries of war don't

allow for finger-printing; that intelligence sources cannot be compromised by fully revealing all evidence; that certain rules and procedures that we enjoy in our justice system must be changed to fit the unique circumstances presented by unconventional warfare.

At the other end of the spectrum, I did not hear a single Member of the Committee argue that enemy non-combatants should be stripped of all due process. No one proposed arbitrary arrests, infinite detentions, or throwing people in Soviet-style gulags.

Indeed, the hearing succeeded in one important respect. It quickly closed-off the extremes that usually detour us endlessly. It established a path that will be confined by the mutual desire to guarantee both national security and the rule of law.

In the weeks ahead, there will be differences on foundational issues: whether a new body of law should be created or whether we should simply modify existing bodies of law. There will be I's to dot and T's to cross. The intricacies of the debate will surely rivet the attention of law professors and constitutional scholars and CSPAN junkies.

But most Americans, I believe, will have an intuitive and plain understanding of where we must end-up.

Designing a system that keeps us safe without having to change our national character. Creating a process that allows us to kill and capture terrorists without having to surrender our values to them.